

No. 88-305

Supreme Court, U.S.

FILED

JAN 4 1989

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1988

SOUTH CAROLINA,

Petitioner,

v.

DEMETRIUS GATHERS,

Respondent.

REPRINTED COPY

On Writ Of Certiorari To The
Supreme Court Of South Carolina

**REPLY TO RESPONSE
TO MOTION TO DISMISS**

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Respondent, Demetrius Gathers, makes the following points in reply to the Petitioner's Response to the Motion to Dismiss:

I. INAPPLICABILITY OF *CARR* v. *ZAJA*

At pages five through seven of Petitioner's response, heavy reliance is placed upon *Carr v. Zaja*, 283 U.S. 52, 51 S.Ct. 360 (1931) and cases collected and cited therein. At page twelve of the Motion to Dismiss at Footnote three (3) this point is addressed and argues that precedent such as the *Carr* case refers to a mandate which has been sent down by the United States Court of Appeals to a Federal District Court. We believe this is an important distinction from the instant case. This case involves a Remittitur which has been sent down by a State's highest court thereby ending jurisdiction of that court to act in the matter. *Carr v. Zaja*, *supra*, and *Aetna Casualty and Surety Company v. Flowers*, 330 U.S. 464, (1947) do not stand for the proposition that this Court may order a state Supreme Court to assume jurisdiction over a case when jurisdiction has been lost as a matter of state procedural law as a result of a party litigant's procedural default.

II. STATE PROCEDURE: PAST AND PRESENT

A.

Petitioner has acknowledged that we have "generally stated the law of Remittitur accurately" in the State of South Carolina, (Response to Motion to Dismiss at page 7), but alleges that we have failed to bring to this Court's attention "certain obvious exceptions" that exist under South Carolina practice. *Id.*, page 8.

Respondent submits there are no "obvious exceptions" to the law as asserted in the Motion to Dismiss. Petitioner has relied upon *State v. Merriman*, 34 S.C. 576, 13 S.E. 898 (1890); *State v. Merriman*, 35 S.C. 607, 14 S.E. 394

(1892); *State v. Keels*, 39 S.C. 553, 17 S.E. 724 (1893) and *McKenzie v. Sifford*, 52 S.C. 394, 26 S.E. 706 (1898) to demonstrate the existence of those "obvious exceptions" that have arisen under South Carolina practice. But not one of the foregoing cases held that a Remittitur can be recalled by the state Supreme Court and the judgment previously entered by that Court reversed as a result thereof. Accordingly, those cases do not establish obvious exceptions to the law as set out in the Motion to Dismiss.

B.

Furthermore, when taking the argument of the Petitioner in a light most favorable to the State of South Carolina, at best it could be said that there was some ambiguity in this area of the law in the latter part of the Nineteenth Century. However, in 1892 the State rule regarding the procedure for staying the Remittitur in the state Supreme Court was amended. See S.C. Sup.Ct.R.XX (1902) at p. 276. Supreme Court Rule XX was codified in the first codification of the South Carolina General Statutes in 1902. See *Code of Laws of S.C., 1902.*, In *Carpenter v. Lewis*, 65 S.C. 400, 43 S.E. 881 (1903) any ambiguity in this area was certainly laid to rest. In *Carpenter v. Lewis*, *supra* the Court dealt with a motion to recall the Remittitur. In refusing to do so the Court reviewed the foregoing rule and then explained why state procedural law required the Supreme Court to retain jurisdiction over the case for a specified period of time. The court stated

[t]he object of this is to reserve jurisdiction over the case, so that, should either of the parties desire to make any motion in reference thereto, they might have the opportunity to do so, and the court the power to hear it. After the Remittitur, however, is sent down, the case passes beyond the reach of the

court, and its jurisdiction is lost, and no motion can be heard by this court on the matter thereafter.

43 S.E. at 882. Compare *Mickle v. Blackmon*, 255 S.C. 136, 177 S.E.2d 548 (1970). Consequently, whatever dicta Petitioner may rely upon from the earlier cases dealing with the possibility of recalling a Remittitur so as to make substantive changes in the verdict, would have certainly been overruled by subsequent case law, *Carpenter v. Lewis*, *supra*; statutory law, S.C. Code Ann. § 18-9-270, 1976, as amended; and Court Rule, S.C. Sup. Ct.R. 17 (1976).

III. ELMORE, JONES AND PLEMMONS

A.

Lastly, Petitioner has submitted certain paperwork from the cases of *Edward Lee Elmore v. South Carolina*, *Donald Allen Jones v. South Carolina*, and *Jerry W. Plemmons v. South Carolina*. In each of those cases the Supreme Court of South Carolina ordered a new capital sentencing hearing after being told to do so by this Court and after their respective Remittiturs had been remanded. See *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669 (1986). However, simply because Petitioner, State of South Carolina, chose not to assert any challenge to the state Supreme Court's jurisdiction to order resentencing hearings in those cases should neither alter the status of the law in South Carolina nor bind forevermore future party litigants in future litigation. Consequently, simply because the Petitioner may have waived any rights to challenge the lower court's jurisdiction in the aforementioned cases should in no way be binding upon the Respondent in the instant case.

Additionally, it needs to be noted that South Carolina law treats an affirmance of a death sentence differently

from the way it treats a reversal of a death sentence. As we pointed out in the Motion to Dismiss, *S.C. Code Ann.* § 16-3-25(F), 1976, as amended, prohibits the affirmance of a death sentence absent a ruling on all legal errors presented in the case. It reasonably follows that the Court need *not* address all legal errors when it reverses a death sentence. This is exactly the course of action the Court followed in the instant case. Moreover, *S.C. Code Ann.* § 17-25-370 requires that a death order be issued by the state Supreme Court upon the remanding of the Remittitur upon the affirmance of a death sentence. Documents show that the state Supreme Court issued a stay of execution in the *Elmore* case on June 6, 1985, in the *Plemmons* case on September 26, 1985, and in the *Jones* case on July 15, 1985. (See Attachments). Thus, due to its non-compliance with *S.C. Code Ann.* § 17-25-370 the state Supreme Court implicitly acknowledged that it would not permit a state procedural rule to bar retrial of those three individuals.

B. -

All of the capital cases relied upon by the Petitioner which supposedly represent the current practice in the State of South Carolina, were cases which were affirmed by the state Supreme Court and which were reversed by this Court with orders, in effect, requiring new sentencing proceedings. As we noted in our Motion to Dismiss, *Henry v. Mississippi*, 379 U.S. 443, 85 S.Ct. 564 (1965) states that the application of the state procedural rule must necessarily be balanced against the legitimacy of the state interest involved in following it. It may be that *Mssrs. Elmore, Jones, and Plemmons* could all overcome application of the procedural rule simply because to bar an unconstitutional execution of each of them could outweigh any legitimate state interest in application of the pro-

cedural rule at issue. Nevertheless, at this juncture South Carolina's failure to seek application of the procedural rule in those cases should act as a concession that such was the case. This certainly should not translate, however, into an assumption that the standard practice in South Carolina regarding the issuance of the Remittitur has been changed because of that concession.

CONCLUSION

WHEREFORE Respondent would request that the Motion to Dismiss and this Reply be treated as part of its Brief in Opposition and we would request that the Petition for Writ of Certiorari be dismissed as have been improvidently granted.

Respectfully submitted,

/s/William Isaac Diggs

WILLIAM ISAAC DIGGS
Chief Attorney

/s/Joseph L. Savitz, III

JOSEPH L. SAVITZ, III
Assistant Appellate Defender
Attorneys for Respondent

APPENDIX

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APPENDIX

The Supreme Court of South Carolina

THE STATE,

Respondent,

v.

EDWARD LEE ELMORE,

Appellant.

ORDER

Petition for Stay of Execution filed in the above matter is granted for a period of sixty (60) days from the date of this Order pending filing of Petition for Writ of Certiorari in the United States Supreme Court.

IT IS SO ORDERED.

/s/ _____ C.J.
FOR THE COURT

Columbia, South Carolina
June 6, 1985

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APPENDIX

The Supreme Court of South Carolina

THE STATE,

Respondent,

v.

DONALD ALLEN JONES,

Appellant.

ORDER

Petition for Stay of Execution filed in the above matter is granted for a period of sixty (60) days from the date of this Order pending filing of Petition for Writ of Certiorari in the United States Supreme Court.

IT IS SO ORDERED.

/s/ _____

FOR THE COURT

David W. Harwell, A.J.,
not participating

Columbia, South Carolina
July 15, 1985

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APPENDIX

The Supreme Court of South Carolina

THE STATE,

Respondent,

v.

JERRY W. PLEMMONS,

Appellant.

ORDER

Petition for Stay of Execution is granted until such time as the United States Supreme Court has ruled on Petition for a Writ of Certiorari in the above entitled matter.

/s/ _____ C.J.

Columbia, South Carolina
September 26, 1985